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CHARLES ELMORE CROPLEY
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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1942.

THE TRAVELERS INSURANCE COMPANY, a Corporation,
Petitioner,

vs.

JOHN I. MAGILL, Conservator of ROY A. McCLINTIC, a Person of Unsound Mind,
Respondent.

No. 1031

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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Counsel for Petitioner.

VINCENT L. BOISAUBIN,
Of Counsel.

ST. LOUIS LAW PRINTING CO., 415 North Eighth Street. CEntral 4477.

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PETITION FOR WRIT OF CERTIORARI.

May It Please the Court:

The petition of The Travelers Insurance Company respectfully shows to this Honorable Court:

A.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This is an action at law by John I. Magill, substituted conservator of Roy A. McClintic, a person of unsound mind, to recover disability benefits under a life insurance policy issued by petitioner, The Travelers Insurance Company, on the life of Roy A. McClintic on May 27, 1921.

The plaintiff conservator claims that the insured was totally and permanently disabled, within the meaning of the policy, in January, 1925, and seeks disability benefits at the rate of $50 per month from July, 1925 (Tr., pp. 1-6).

The defendant Insurance Company, petitioner herein, claims that the policy lapsed on June 9, 1925 (Tr., p. 10), and that no proof of disability was ever at any time furnished the company by either the insured or by anyone on his behalf (Tr., p. 11). That the furnishing of proof, as required by the policy, is a condition precedent to liability under Missouri law (Tr., p. 11).

Plaintiff (respondent) contends that the insanity of the insured, which, it is claimed, existed at and prior to the lapse of the policy, excused the furnishing of proof, and that, despite the failure to furnish proof, the defendant company is liable for disability benefits from the time of the disability.

The principal issue of law in the case is whether, under Missouri law, insanity excuses, or renders unnecessary, the furnishing of proof of disability under a policy which makes the furnishing of proof a condition precedent to liability. The United States Circuit Court of Appeals for the Eighth Circuit recognized in its opinion that there was no controlling Missouri decision on the question involved. Nevertheless, that Court decided the issue against petitioner, and held that insanity did excuse the furnishing of proof, and that the company was liable for the disability benefits for some fifteen years, despite the failure to furnish proof.

While the case was under submission in the Circuit Court of Appeals (Eighth Circuit), the St. Louis Court of Appeals rendered a decision by a divided court upon the very question involved. The dissenting Judge certified said case to the Supreme Court of Missouri for final decision. The case is now pending in the Supreme Court of

Missouri and is entitled "Frieda A. Schoen, Guardian, etc., of Theodore A. G. Schoen, Appellant, v. American National Insurance Company, a corporation, Respondent," No. 38,488. The case is set for argument on May 21, 1943 (Tr., p. 354).

In petitioner's motion for rehearing before the Circuit Court of Appeals (Eighth Circuit) petitioner called that Court's attention to the pendency of the Schoen case in the Supreme Court of Missouri, and called the Court's attention to the fact that the decision of the Missouri Supreme Court in the Schoen case would settle the applicable law upon the issue before that Court, and requested that the final decision of the Court of Appeals be held in abeyance until the Missouri Supreme Court had decided the Schoen case (Tr., p. 353 et seq.). The Court of Appeals, Eighth Circuit, nevertheless overruled the motion for rehearing. Accordingly, the case must be remanded to the District Court for retrial, with costs against this petitioner, unless stayed in the Court of Appeals until the controlling decision has been rendered by the Missouri Supreme Court in the Schoen case.

B.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT.

1. Under the decisions of this Court in

> Erie R. R. v. Tompkins, 304 U. S. 64;
> Ruhlin v. New York Life Ins. Co., 304 U. S. 202;
> Lyon v. Mutual Ben. H. & A. Co., 305 U. S. 484;
> Wichita Royalty Co. v. City National Bank, 306 U. S. 103,

the rights of the parties are to be determined by the applicable law of the state. It is important that the rule of this Court, so announced, be followed by the courts of appeal. The Court of Appeals for the Eighth Circuit, under

the circumstances stated in the summary statement, erred in not retaining jurisdiction of the case until the Missouri Supreme Court had announced the applicable Missouri law in the case pending, at the time, before that Court.

2. Under Missouri law, the furnishing of proof of disability is a condition precedent to liability.

Adams v. Met. Life Ins. Co., 74 S. W. (2d) 899, 228 Mo. App. 915;
Moss v. Met. Life Ins. Co., 84 S. W. (2d) 395, 230 Mo. App. 70;
Grafe v. Fid. Mut. L. Ins. Co., 84 S. W. (2d) 400;
Farmers v. Met. Life Ins. Co., 85 S. W. (2d) 235;
Martin v. Illinois Bankers L. Ins. Co., 91 S. W. (2d) 646;
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Sutherland v. Met. Life Ins. Co., 99 S. W. (2d) 111;
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Feinberg v. New York Life Ins. Co., 127 S. W. (2d) 82;
Brown v. Mut. Life Ins. Co., 140 S. W. (2d) 91.

"Condition precedent" means that until and unless proof is furnished pursuant to the contract obligation to do so, no liability arises, and nothing that develops after the contract is made excuses the obligation to make proof. "Insanity" is no more an excuse than any one of many things that might subsequently develop to render the performance of the condition difficult or even impossible. The covenant to furnish proof was solely that of the insured. Therefore, the Court erred in holding that insanity excused the furnishing of proof, for to so hold is to ignore and fail to apply the Missouri law that furnishing proof is a *condition precedent* to liability.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals, Eighth Circuit, commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. 12,451, John I. Magill, Conservator of Roy A. McClintic, a person of unsound mind, Appellant, v. The Travelers Insurance Company, Appellee, and that the said judgment of the Circuit Court of Appeals, Eighth Circuit, may be reviewed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

THE TRAVELERS INSURANCE COMPANY,

By JAMES C. JONES, JR.,
Counsel for Petitioner.

VINCENT L. BOISAUBIN,
Of Counsel.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

THE OPINION OF THE COURT BELOW.

The opinion of the Court of Appeals for the Eighth Circuit is reported in 133 F. (2d) 709. The per curiam opinion on motion for rehearing is set out at pages 367 and 368 of the transcript.

II.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 938 (28 U. S. C. A., Sec. 347).

The judgment of the Circuit Court of Appeals, Eighth Circuit, reversing and remanding the case to the District Court of the United States for the Eastern District of Missouri, was entered on February 23, 1943 (Tr., p. 340), and the petition for rehearing was denied on April 7, 1943 (Tr., p. 367). Thirty days stay of mandate was granted on April 19, 1943 (Tr., pp. 369-370).

The following cases are believed to sustain the jurisdiction of this Court:

Erie R. R. v. Tompkins, 304 U. S. 64;
Ruhlin v. New York Life Ins. Co., 304 U. S. 202;
Lyon v. Mut. Ben. H. & A. Co., 305 U. S. 484;
Wichita Royalty Co. v. City National Bank, 306 U. S. 103;
Continental Casualty Co. v. Agee, 268 U. S. 687.

III.

STATEMENT OF THE CASE.

Under the heading A in the petition ante is a statement of the case in so far as it is material to the consideration of the question presented, and in the interest of brevity is not repeated here.

IV.

SPECIFICATION OF ERRORS.

1. The Circuit Court of Appeals, Eighth Circuit, erred in failing to apply the Missouri law that the furnishing of proof of disability, under the policy in suit, is a condition precedent to liability, and consequently erred in holding that the insanity of the insured rendered unnecessary the furnishing of said proof.

2. After its attention was called to a case pending in the Supreme Court of Missouri in which the precise and specific point here involved was before that Court for determination, the Court of Appeals, Eighth Circuit, erred in failing to defer its final decision in this case, and erred in reversing and remanding the case to the District Court for retrial.

ARGUMENT.

Under the Missouri law, the provision in the policy in suit requiring the furnishing of proof was a condition precedent to the liability of the insurer for any disability benefits (Missouri cases cited under B 2).

If the furnishing of said proof is a valid condition precedent to liability, then nothing excuses the performance of that condition. It is a covenant of the insurer freely and lawfully made and must be performed if the consideration which is conditioned upon its performance is to be obtained. The Court erred, therefore, in holding that the subsequent insanity of the insured excused or rendered unnecessary the furnishing of proof. To so hold is to fail to give force and effect to the Missouri law that the furnishing of proof is a *condition precedent* and hence violates the rule announced by this Court in Erie R. R. v. Tompkins, 304 U. S. 64, and kindred cases.

Since the attention of the Court of Appeals, Eighth Circuit, was specifically called to the fact that the precise point involved was pending before the Supreme Court of Missouri in the Schoen case, set for hearing in that court on May 21, 1943, the Court of Appeals, Eighth Circuit, erred in not deferring its final decision until the Missouri Supreme Court had announced the controlling law. By so failing to defer its decision, the Court of Appeals, Eighth Circuit, has imposed the costs of the appeal upon this petitioner and the trouble and expense of a new trial in the District Court, all of which might be avoided if the Court of Appeals had retained jurisdiction of the case and deferred its final decision pending the outcome of the case in the Missouri Supreme Court. The action of the Court of Appeals was thus a violation of the spirit and purpose of the rule of this Court as announced in Erie

R. R. v. Tompkins, 304 U. S. 64. Precedent for granting the writ of certiorari under the circumstances obtaining here is found in the action of this Court in *Continental Casualty Co. v. Agee*, 268 U. S. 687, in which this Court granted its writ of certiorari to review the decision of the Circuit Court of Appeals, Eighth Circuit, when the attention of that Court was called to the fact that there was pending in the Supreme Court of Utah a case involving the construction of a suicide statute of Utah which would have been controlling upon the Court if it had deferred its decision in the Agee case, which it had declined to do, pending the determination by the Supreme Court of Utah of the case in that court. That decision was rendered and the writ therein granted before the decision of this Court in Erie v. Tompkins. *A fortiori*, since Erie v. Tompkins, we respectfully submit that, in the exercise by this Court of its supervisory powers, the writ should be granted as prayed.

JAMES C. JONES, JR.,
Counsel for Petitioner, The Travelers Insurance Company.

VINCENT L. BOISAUBIN,
Of Counsel.

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JOHN I. MAGILL, Conservator of ROY A. McCLINTIC, a Person of Unsound Mind,
Respondent.
No. 1031.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

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Statute Cited.

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OPINION BELOW.

The opinion of the Court of Appeals is reported in 133 F. (2d) 709.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered February 23, 1943 (R. 340), and the petition for rehearing was denied April 7, 1943 (R. 367). Thirty days' stay of mandate was granted April 19, 1943 (R. 369, 370).

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 938 (28 U. S. C. A., Sec. 347).

QUESTION PRESENTED.

The question presented is whether insanity excuses compliance with an insurance policy provision respecting disability benefits which requires notice and proofs thereof.

STATEMENT.

The petition for writ of certiorari sets out the facts and the issue involved, namely, whether insanity excuses the giving of notice and proof of disability. For brevity respondent does not set out a statement in extenso.

However, respondent submits that the instant petition **incorrectly** states that said United States Circuit Court of Appeals, in the opinion at bar, recognized that there was no controlling Missouri decision on the question involved.

As a matter of fact, the Court of Appeals in its opinion (R. 347, 348, 349) holds that under the Missouri law insanity excuses the giving of notice and proof.

ARGUMENT.

The Court of Appeals states (R. 348, 349) that the Missouri Supreme Court has not directly passed upon the question in construing the disability clause of an insurance policy and "is undoubtedly free to follow the rule that mental incapacity does not excuse noncompliance with the requirement of due proof of disability." But said Court of Appeals also states (R. 347) that this Court, in **Mutual Life Ins. Company of N. Y. v. Johnson**, 293 U. S. 335, cited Roseberry v. American Benevolent Association, 142 Mo. App. 552, 121 S. W. 785, as showing that Missouri is among those states which support the view that waiver of premium because of disability having been promised, subject to a condition as to notice, under a liberal construction of the requirement, such notice is merely modal or procedural and insanity excuses notice and proof even though the requirement was a condition precedent.

The Court of Appeals also cites **Hayes v. Equitable Life Assurance Society**, 235 Mo. App. 1261, 150 S. W. (2d) 1113, 1117, to support the Court's position that in Missouri insanity excuses notice and proof. Said Court of Appeals also holds that the trial court, in this Magill case, believed such to be the law (R. 349).

In addition to the Roseberry and Hayes cases, cited supra, there are also the cases of **Hayes v. Continental Cas. Co.**, 98 Mo. App. 410, 72 S. W. 135, and Randolph v. City of Springfield, 257 S. W. 449 (Mo. Sup. Ct.), 302 Mo. 33, which support the Missouri rule that insanity or incapacity **does excuse** the giving of notice and proofs. In the Randolph case, supra, the Missouri Supreme Court held that where notice of an accident is required by statute as a condition precedent to bringing suit against a

municipality, the giving of said notice is excused by reason of physical or mental incapacity to give the same.

In **Schoen v. American National Insurance Company,** 167 S. W. (2d) 423, l. c. 429, the St. Louis Court of Appeals, in the majority opinion, discusses the Roseberry case, which held that where insured was unconscious for three weeks, he was excused from complying with a policy condition requiring written notice to be given within ten days. The Court there said (l. c. 429):

> "To the same effect is the case of Hayes v. Continental Casualty Co., 98 Mo. App. 410, 72 S. W. 135, and the case of Hayes v. Equitable Life Assurance Society, 235 Mo. App. 1261, 150 S. W. (2d) 1113. **We think these cases are squarely in point in this case, and a mere reading of those cases and the authorities cited is ample authority for stating the rule in our State to be, that in insurance contracts, where a condition precedent to the insured's right of recovery for a disability insured against is that notice be given before a cause of action accrues, that such notice is excused in a case where the evidence shows that the insured was rendered incapable of giving such notice by reason of his mental incapacity caused by or accompanying the very thing insured against.**" (Boldface ours.)

Obviously, under the Missouri rule, notice and proofs are excused by insanity. Petitioner essays to change the Missouri law, which the United States Circuit Court of Appeals for the Eighth Circuit followed in deciding the instant case. Respondent thus disagrees with petitioner's charge (petition for certiorari, p. 7) that: "the Circuit Court of Appeals, Eighth Circuit, erred in failing to apply the Missouri law that the furnishing of proof of disability, under the policy in suit, is a condition precedent to liability, and consequently erred in holding that the

insanity of the insured rendered unnecessary the furnishing of said proof."

Likewise petitioner is in error in charging (petition for certiorari, p. 8) that the holding of the Court of Appeals fails to give force and effect to the Missouri law that the furnishing of proof is a condition precedent. The Missouri law is as stated above.

The cases cited in the petition for certiorari (p. 4) are all cases where there was no issue of insanity involved. It is like citing the case of Bergholm v. Peoria Life Ins. Co., 284 U. S. 489, which was relied upon by the petitioner in the Court of Appeals. This Court in the Johnson case, supra, held:

> "Bergholm v. Peoria Life Ins. Co., etc., is not apposite, there being no evidence in that case of incapacity, physical or mental, to give the prescribed notice."

In the Johnson case, supra, this Court recognized the distinction between the cases where there is no issue of insanity or incapacity to give the required notice and proof, and cases where there is insanity or incapacity so to do; the Court of Appeals in its opinion at bar (R. 347) expressly recognized the distinction made in the Johnson case, supra, and holds that in Missouri the rule is that insanity or incapacity excuses the giving of notice and proof.

Conclusion.

Respondent submits that it is unlikely that the Missouri Supreme Court will, in the future, change the present prevailing Missouri rule in deciding the Schoen case; that the United States Court of Appeals is not in error in following the present Missouri rule. Said court would have

erred if it had not done so and would have violated the rule stated in Erie R. R. v. Tompkins, 304 U. S. 64, and kindred cases. Since said court followed the Missouri rule, there is no reason for this Court to review the decision of said Court of Appeals.

Wherefore, respondent prays that the Court deny the petition for writ of certiorari.

Respectfully submitted,

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